

****E-filed 11/2/10****

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FRANCISCO M. ORTIZ, et al.,

No. C 10-4812 RS

Plaintiffs,

v.

**ORDER DENYING MOTION FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

WELLS FARGO BANK,

Defendants.

Plaintiffs Francisco M. and Reyna R. Ortiz seek a temporary restraining order and/or a preliminary injunction precluding defendant Wells Fargo Bank from proceeding with a non-judicial foreclosure sale of the Ortiz's home, presently scheduled for November 4, 2010. An application for preliminary relief requires the plaintiff to "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. N.R.D.C., Inc.*, 129 S.Ct. 365, 374 (2008). The Ninth Circuit has clarified, however, that courts in this circuit should still evaluate the likelihood of success on a "sliding scale." *Alliance for Wild Rockies v. Cottrell*, ___F.3d ___, 2010 WL 3665149, *8 (9th Cir. 2010) ("[T]he 'serious questions' version of the sliding scale

1 test for preliminary injunctions remains viable after the Supreme Court's decision in *Winter*.”) As
2 quoted in *Cottrell*, that test provides that, “[a] preliminary injunction is appropriate when a plaintiff
3 demonstrates . . . that serious questions going to the merits were raised and the balance of hardships
4 tips sharply in the plaintiff's favor,” provided, of course, that “plaintiffs must also satisfy the other
5 *Winter* factors, including the likelihood of irreparable harm.” *Id.*

6 In view of these standards, the plaintiffs' motion is denied for all of the following reasons:

7 1. To the extent that plaintiffs' claims are based on the allegation that Wells Fargo has not
8 completed its review of their application for a loan modification, they have not established a
9 likelihood that they can prevail in showing that Wells Fargo has any legal obligation to agree to a
10 loan modification.

11 2. To the extent that plaintiffs' claims are based on a contention that Wells Fargo has not
12 fulfilled a statutory or other duty to communicate with plaintiffs “to help the Plaintiffs to avoid
13 foreclosure of their property,” they have not presented sufficient facts or evidence to show they are
14 likely to succeed in proving Wells Fargo violated any such duties, and that it lacks the right to
15 proceed with foreclosure as a result.

16 3. To the extent that plaintiffs' claims are based on any alleged violations of RESPA, they
17 have not presented sufficient facts or evidence to establish a likelihood of success on the merits of
18 such claims. Plaintiffs' conclusory allegation that they are “certain that Wells Fargo Bank violated
19 RESPA” likely is insufficient even to state a claim under the statute, and does not support issuance
20 of preliminary relief.

21 4. To the extent that plaintiffs are relying on reports and commentary in the media
22 regarding the “national foreclosure crisis,” including reports of fraud and abuses in lending and
23 foreclosure practices, they have not presented sufficient facts or evidence to establish that they are
24 likely to succeed in proving that the specific foreclosure they seek to enjoin in this action is
25 unlawful. The conclusory and non-specific allegations in plaintiffs' brief that some of the
26 documentation is “questionable” are insufficient to support issuance of injunctive relief

27 5. Finally, the passing allegations in plaintiffs' complaint and briefing that Wells Fargo's
28 name does not appear on the underlying deed of trust and that its right to foreclose is therefore

1 “questionable” do not constitute a factual or legal showing that plaintiffs are likely to prevail on the
2 merits.

3
4 IT IS SO ORDERED.

5
6 Dated: 11/2/2010



RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

THIS IS TO CERTIFY THAT A HARD COPY OF THIS ORDER WAS MAILED TO:

Francisco M. Ortiz
Reyna R. Ortiz
1716 Bush Avenue
San Pablo, CA 94806

DATED: 11/2/2010

/s/ Chambers Staff
Chambers of Judge Richard Seeborg